Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

William T. Moham, Petitioner

v.

Steego Corporation, et al, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Tommy Mason and Joe Leone were STEEGO CORPORATION supervisory personnel with the power to hire, fire, give pay raises and make work assignments. While employed by STEEGO CORPORATION and during work hours, Mason and Leone refused MOHAM's application for employment with a third party, a distinct and separate successor corporation, in favor of a younger White person. Were Mason and Leone agents of STEEGO CORPORATION when they acted to deprive WILLIAM MOHAM of an equal opportunity for employment so that STEEGO CORPORATION can be held liable for the acts of Mason and Leone?

2. May an employer be held liable when its agent interferes with an employee's employment opportunity with a third party? Assume that the agent's intent is not to benefit his employer.

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QUESTIONS PRESENTED FOR REVIEW

1. Tommy Mason and Joe Leone were STEEGO CORPORATION supervisory personnel with the power to hire, fire, give pay raises and make work assignments. While employed by STEEGO CORPORATION and during work hours, Mason and Leone refused MOHAM's application for employment with a third party, a distinct and separate successor corporation, in favor of a younger White person. Were Mason and Leone agents of STEEGO CORPORATION when they acted to deprive WILLIAM MOHAM of an equal opportunity for employment so that STEEGO CORPORATION can be held liable for the acts of Mason and Leone?

2. May an employer be held liable when its agent interferes with an employee's employment opportunity with a third party? Assume that the agent's intent is not to benefit his employer.

LIST OF PARTIES TO THE PROCEEDINGS

A. Petitioner (Plaintiff-Appellee below) — *William T. Moham*, a Black male, domiciled in Mansfield, DeSoto Parish, Louisiana.

B. Respondent (Defendant-Appellant below) — *Steego Corporation*, domiciled in Jacksonville, Florida, with offices in various states. It is the parent corporation of Nabors Trailers, Inc., a Delaware Corporation.

C. *Nabors Trailers, Inc., a Deleware Corporation* — this corporation is a subsidiary of Steego Corporation. Steego Corporation by stipulation at trial assumed all liability for the acts of Nabors Trailer, Inc., a Delaware Corporation.

D. *Mansfield Industries, Inc., a Louisiana Corporation* — this corporation purchased Nabors Trailer, Inc., a Delaware Corporation from Steego Corporation. This corporation changed its name to Nabors Trailers, Inc., a Louisiana Corporation.

E. *Nabors Trailers, Inc., a Louisiana Corporation* — this corporation was dismissed without prejudice on June 11, 1992, (This corporation was originally named Mansfield Industries, Inc.; it is the successor corporation to Nabors Trailers, Inc., a Delaware Corporation.)

TABLE OF AUTHORITIES

CASES

United States Supreme Court:

General Building Contractors V. Pennsylvania,
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CONSTITUTIONAL PROVISIONS

NONE.

STATUTES

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TEXTBOOKS

NONE.

MISCELLANEOUS

NONE.

OPINIONS BELOW

The September 27, 1993, opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is at the time of writing is not yet published but is reprinted in the separate Appendix to this Petition, at page 22. The prior opinion of the United States District Court for the Western District of Louisiana, entered on September 30, 1992, is unreported. It is reprinted in the separate Appendix to this Petition at page 33.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 1993. The jurisdiction of this Court is invoked pursuant to 28 USC Section 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES and REGULATIONS INVOLVED

42 USC 2000e. Definitions

For purposes of this title —

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar, and any agent of such a person, ...

42 USC 2000e-2

(a) Employers. It shall be an unlawful employment practice for an employer —

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals' race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Nabors Trailers, Inc., a Delaware Corporation (STEEGO)[1] operated a truck trailer manufacturing and servicing plant in Mansfield, Louisiana. The plant originally opened in 1923. It was sold to Sterling Precision which later became STEEGO.

William T. Moham ("MOHAM") is a Black person (d.o.b. April 13, 1930) employed by STEEGO beginning on September 16, 1966, as a repairman. He has never been fined, suspended, terminated or otherwise disciplined in any fashion during the entire time he was employed at STEEGO. (Tr.P. 184, L. 19, by Moham; Tr.P. 139, L. 2, by Leone) His attendance at work was exceptional, having only missed 6-11 hours in the entire time he worked for STEEGO (a/k/a NABORS/DELAWARE) (Tr.P. 184, L. 9 by Moham). MOHAM worked in the repair shop during the entire time he was employed there; his duties included occasional welding, body work, sand blasting and other duties.

MOHAM worked in the repair shop which is a division of the Service Department. The repair shop repairs and services truck trailers. The service department was supervised by Joe Leone. (Tr.P. 128, L. 2) Divisions other than repair in the service department are shipping and parts. Tommy Mason supervised the repair shop. He had the ability to hire, fire, give pay raises and to make work assignments. Although these powers are technically subject to approval of Joe Leone, Mr. Leone could not think of a single instance in which he disapproved of Mason's personnel actions. (Tr.P. 128, L. 22)

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[1] Steego Corporation stipulated at the trial court that it would be liable for any acts of its subsidiary, Nabors Trailers Corporation, a Delaware Corporation. Hence, all references are made to STEEGO rather than Nabors Trailers Corporation, a Delaware Corporation.

The U.S. Fifth Circuit Court of Appeals did not reach the issue of the loss of an equal employment opportunity on the basis of race (i.e., discrimination). However, the Court noted that the district court made the required finding of discrimination. In its Opinion, the Fifth Circuit assumed discrimination.

Beginning sometime in early 1988, rumors at the trailer plant were that NABORS/DELAWARE was looking to sell its assets in Mansfield, Louisiana. Actually, similar rumors had been adrift in the plant for several years. Business had been bad: the manufacturing department (i.e., production) had shut down. But the service department remained opened.[2]

Negotiations on the sale to the eventual purchasers, MANSFIELD INDUSTRIES, INC. later to become NABORS TRAILERS, INC., a Louisiana Corporation (NABORS/LOUISIANA) began sometime before July 1988. On August 24, 1988, the plant and the assets located at Mansfield, Louisiana and which belonged to NABORS/DELAWARE (a/k/a STEEGO) were sold to MANSFIELD INDUSTRIES, INC. On August 25, 1988, MANSFIELD INDUSTRIES changed its name to NABORS/LOUISIANA.[3] All operations ceased at the plant on or about September 9, 1991.

During the two months before the completion of the sale, several supervisors and department heads met with J.W. Lowrey, the spokesperson for the prospective buyers of the

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[2] Mr. Leone testified, and probably rightfully so, that the only reason the service department remained opened was to make the plant attractive to a buyer. (Tr.P. 130, L.1)

[3] MOHAM voluntarily dismissed MANSFIELD INDUSTRIES, INC. and NABORS/LOUISIANA, without prejudice because of its impecunious status.

plant. These individuals included Joe Leone, the service department supervisor and NABORS/DELAWARE (a/k/a STEEGO) plant superintendent, Bobby Dillard. (Tr.Pp. 242-243 by Dillard; and Tr.P. 143, L. 14 by Leone). Tommy Mason was not present at the meeting. They met at Mr. Lowrey's home to discuss such things as the business and financial strategy. There was no discussion of employment of anyone by the prospective buyers (i.e., NABORS/LOUISIANA). (Tr.Pp. 143-144; P. 245, L.9).

Leone testified that the "transition" between STEEGO and NABORS/LOUISIANA was loose, informal but that he knew he had to get a crew together. Joe Leone further testified that he assumed STEEGO should have known about the recruitment efforts on its premises. (Tr.P. 148, L. 7) More importantly, there is little doubt but that all supervisors at the plant knew of the recruiting drive. (Tr.P. 148, L. 7) STEEGO neither gave formal instructions prohibiting or encouraging recruitment. (Tr.P. 248, L. 15 by Dillard; Tr.P. 133, L. 9 by Leone). NABORS/DELAWARE (a/k/a STEEGO) had full knowledge of the hiring drive since its agents were the ones conducting it. Conversely, the purchasers never gave any instructions relative to hiring employees. (Tr.P. 75 by Mason; Tr.P. 223, L. 7 by Lowrey). The parties understood, including the STEEGO negotiators that Mansfield Industries (a/k/a NABORS/LOUISIANA) was buying an ongoing concern and not buying for scrap. (P. 228, L. 16).

In the following weeks Joe Leone gave Tommy Mason employment application forms for the workers in the repair shop. This event occurred during regular business hours on the premises of NABORS/DELAWARE.[4] Tommy Mason, passed applications to each worker personally during regular

[4] Significantly, every act performed by Mason or Leone which deprived MOHAM of an equal employment opportunity occurred during business hours and on the premises of NABORS/DELAWARE.

business hours. And, Mason told the men to return the applications to work for NABORS/DELAWARE.

Joe Leone and Tommy Mason after the return of the applications, personally interviewed each worker, except Mr. Moham and another black co-worker. All of the interviews took place during regular work hours and in the office of Joe Leone on the plant premises. (Tr.P. 131-132 by Leone; Tr.P. 75 by Mason). Mr. Moham had returned an application. Mr. Woods, the other Black in the repair shop, had been injured on the job and had not yet returned to work; he did, however, return an application. All of the interviewees were eventually hired by the purchasing company, NABORS/LOUISIANA. (Tr.P. 141, L. 10). There was no difference in pay or terms except for a drug screening consent form.

Leone and Mason were paid as usual by STEEGO (i.e., NABORS/DELAWARE) for time used conducting the interviews for prospective employees to work for NABORS/LOUISIANA. (Tr.P. 75, L. 18 by Mason). Leone testified that his authority to hire came from STEEGO and not Mansfield Industries (i.e., NABORS/LOUISIANA) because " . . . we weren't working for them (i.e., Mansfield Industries." (Tr.P. 151, L. 11).[5]

At about 5:00 o'clock p.m. on August 23, 1988, as Mr. Moham was "punching out" at the time clock, Mr. Tommy Mason told petitioner that he need not come back to work the next day if the sale of the company went through at midnight. Mr. Moham asked him why. Mr. Mason replied that Moham had not returned an application. Plaintiff

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[5] Whether STEEGO had any actual knowledge or control over the recruiting is irrelevant since STEEGO has agreed to liability for the acts of NABORS/DELAWARE. It should be undisputed that most if not all of the NABORS/DELAWARE management knew of the hiring drive being conducted on the premises during regular business hours since it was that very management doing the interviewing, passing out of applications and hiring.

offered an application. Mr. MOHAM needed only minutes to retrieve the application from his home. (Tr.P. 181 by Moham; Tr.P. 77 by Mason) Mason told plaintiff he could do so only the next day at the Louisiana Job Service in Mansfield, Louisiana.

Between 5 p.m. and 6 p.m. that same evening, Mr. Mason telephoned his old friend to tell his son, Clay Cobb, to come to the plant for an interview. Mr. Leone and Mr. Mason interviewed Clay Cobb, a white nineteen year old, and hired him to begin work the next morning for MANSFIELD INDUSTRIES (a/k/a NABORS/LOUISIANA). Clay Cobb was hired to fill Mr. Moham's position. (Tr.P. 81, L. 12) Mr. Mason had reached a decision about Mr. Moham well before August 23, 1988, since Mr. Moham's last paycheck had already been issued before that date (and not on the regular Thursday payday). Memorandum Ruling, Appendix B: "Obviously, plaintiff was not expected to be at work on Thursday (August 25, 1988)."

Mr. Moham never worked for NABORS/LOUISIANA, as was stipulated by the parties. He has not been employed by NABORS/LOUISIANA or any related business since August 23, 1988.

REASONS FOR GRANTING THE WRIT

The judgment of the United States Court of Appeals for the Fifth Circuit Court of Appeals should be reviewed by this Court because it so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision: First, the appellate court's decision is contrary to the majority of decisions regarding who is an agent for purpose of Title VII. Second, the decision is contrary to the purpose of Title VII and is grounded solely in dicta from this Court's decision in *Meritor Savings Bank V. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). The Fifth Circuit's reliance on *Meritor Savings Bank* is misplaced. Third, the Court's opinion is in apparent conflict with

General Building Contractors v. Pennsylvania, 458 US 375, 73 L.Ed. 2d 835, 102 S.Ct. 3141 (1982).

Fourth, the Court of Appeals failed to fully analyze the issue of liability for interferring with the employee's right to seek employment with a third party. This aspect of Title VII has not been addressed by this Court before.

First: Conflict with other circuits

The Fifth Circuit[6] as well as other Circuits have established that in Title VII cases if an employer has control over the supervisor, the discriminatory acts of the supervisor are imputed to the principal/employer, thereby creating liability on the principal/employer. For example, see *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), vacated in part on other grounds on reh'g, 900 F.2d 27 (4th Cir. 1990); *Shager v. Upjohn Co.*, 913 F.2d 398, 404-5 (7th Cir. 1990); *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 604 (7th Cir. 1985) (if harasser is the agent then whether **his** superiors know or should have known what he did is irrelevant.); *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1511-1514 (11th Cir. 1989) (for sexual harassment purposes, a supervisor is an agent if the case is a "quid pro quo" one); *Tafoya v. Adams*, 612 F. Supp. 1097 (D. Colo 1985), aff'd 816 F. 2d 555 (10th Cir.), cert. den. 108 S. Ct. 152 (1987).

Even this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) supports the finding that the American general rule is employer liability for acts of supervisory employees: "Thus,

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[6] See *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986) (en banc) at 444.; *Gay v. Board of Trustees of San Jacinto College*, 608 F.2d 127 (5th Cir. 1979); *Jett v. Dallas Independent School Dist.*, 798 F.2d 748 (5th Cir. 1986) at 762, fn. 13.; *Flanagan v. A.I. Henry Com. Health Services Ctr.*, 876 F.2d 1231 (5th Cir. 1989); *Harvey v. Blake*, 913 F.2d 226 (5th Cir. 1990).

the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions." 91 L.Ed.2d at 62; 477 U.S. at 70.

However, in this case, the Fifth Circuit clearly places an additional requirement on the plaintiff to prove that what the agent was doing for the employer when he committed racial discrimination was in fact benefiting the defendant employer: "It is the state of the servant's mind which is material . . . . Conduct is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master."

The majority rule as of this writing seems to be that if the employer has vested the employee with the power to hire or fire and the employee exercises this power within the course and scope of his employment, then this employer is liable.

The Fifth Circuit in this case is building a barrier to obtain relief under Title VII in that the plaintiff must prove the discriminator was ". . . motivated to some extent by an intent to serve his master". The act is within the course and scope of employment if the act is done during work hours at the work place. Petitioner met this burden.

Moreover, MOHAM was never employed by any other party than STEEGO. Nor did any other employer seek to employ MOHAM. At the time of the discrimination, neither Mason nor Leone had been paid or employed by any other party than STEEGO.

Second: Reliance on Meritor Savings Bank v. Vinson misplaced

In *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), this Court declined to set forth any

definitive ruling on the liability of an employer for the acts of its employees. It did, however, reject "absolute liability on employers for the acts of their supervisors, regardless of the circumstances." Petitioner reads this case only as an attempt to reject the principle of strict liability of an employer for the acts of a supervisor who has no power to hire or fire or to do the act which resulted in the discrimination at issue. What does seem to be the rule is that if the employer gives the employee the power to do a particular act and the employee exercises the power in a discriminatory manner which violates the Title VII, then the employer is strictly liable. The latter is the case here.

The Court of Appeals read *Meritor Sav. Bank, FSB v. Vinson,* supra. to make the principles of agency fully applicable. However, this Court stated: "We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for **guidance** in this area." (Emphasis Supplied). The Court of Appeals ignored the intent of Congress to apply Title VII to a wide range of acts. Title VII is to be liberally construed in favor of finding coverage. *Bostick v. Rappleyea,* 629 F.Supp. 1328, 1334 (N.D. N.Y. 1985).

The appellate court imposes a requirement that the agent be doing an act which is intended in part to benefit the employer. This rule set down by the Court of Appeal creates in itself a mind boggling assortment of issues: is the intent subjective or objective? Need the plaintiff prove that paying Blacks less than Whites for the same work is motivated by a cost savings drive for the employer? Or, should the discharge of women if motivated by personal reasons rather than to benefit the employer, be a defense? Is ever the act of discrimination done in part to benefit the employer? What does "benefit" mean?

No court found by the writer has ever used the test provided by the Fifth Circuit Court of Appeals. Its wide application would open a pandora's box. When a defendant

is a corporation, it would be next to impossible to find a discriminatory intent without being able to look to one or more of its agents who have been empowered to commit the discriminatory act. It should be self-evident that discrimination is energized and motivated by deep-seated personal fear and anger; it has no motivation outside the self. It is easily imaginable that acts of discrimination could certainly financially damage the employer: discharging key personnel at critical times or sexually harassing top producers, for example.

Third: Court of Appeals ruling apparently contradicts General Building Contractors v. Pennsylvania, supra

In the *General Building Contractors v. Pennsylvania,* supra., this Court ruled in a Section 1981 case that since no agency/principal nor master/servant relationship existed between labor unions and employers, then the employers could not be held vicariously liable. However, Justices O'Connor and Blackmun in a concurring opinion imply that traditional notions of respondeat superior should apply. 73 L.Ed.2nd at 858; 458 U.S. at 404. Thus, it would appear that the rules of agency are not controlling. The majority opinion making references to a master/servant relationship also indicates that something less than a strict interpretation of agency principles would apply.

This interpretation is appropriate when the case concerns the acts of a paid employee who acts on the premises during regular work hours and within the bounds of the power delegated to him by the employer. The Fifth Circuit Court of Appeal panel skirts the relationship between STEEGO and the offending employees by stating they were not agents of STEEGO when they acted, but acted for NABORS/LOUISIANA. To follow this reasoning, it must be concluded that the agency relationship exists when the

principal does not direct the actors, does not pay the actors, has not given the actors any powers, has no control over the actors acts, and has no control over the premises where the actors acted.

Fourth: Third Party Liability for Interference with Employment Opportunity

The Court of Appeal refused to address this issue, stating that the real issue is whether the actors were in fact agents of the principal. Petitioner respectfully argues that since the actors were acting within the powers granted unto them (i.e., to refuse employment) and within the course of their employment (on the premises during work hours), then it should have decided if the acts of STEEGO in interfering with MOHAM's employment opportunity with a third party is actionable.

42 USC 2000e-2 (a) (1) provides that no employer shall discriminate against **any** employee with respect to his compensation, terms, conditions or privileges of his employment because of such individual's race. Further, no employer shall limit, segregate or classify his employees in a way which would tend to deprive any individual of employment opportunities, because of such individual's race. 42 USC 2000e-2 (a) (2). *Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019 (9th Cir. 1983) at 1021. In *Sibley*, infra at page 1341, the Court stated:

> Control over access to the job market may reside, depending upon the circumstances of the case, in a labor organization, an employment agency, or an employer as defined in Title VII; and it would appear that Congress has determined to prohibit each of these from exerting any power it may have to foreclose, on invidious grounds, access by any individual to employment opportunities otherwise available to him. To permit a covered employer to

> exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.
> See also *Naismith v. Professional Golfers Ass'n,* infra at 559.

Title VII is to be liberally construed in favor of finding coverage. *Bostick v. Rappleyea,* 629 F.Supp. 1328, 1334 (N.D. N.Y. 1985). Title VII does not require that an individual be deprived of an employment opportunity by his employer or even his potential employer. Thus, an employer may be held liable for discriminatory practices which interfere with an employee's opportunity with another employer. *Lutcher v. Musicians Union Local 47,* 633 F.2d 880 (9th Cir. 1980) at page 883, n. 3; *Sibley Memorial Hospital v. Wilson,* 488 F.2d 1338 (D.C. Cir. 1973). See also *Fairman v. Saks Fifth Ave., Inc.* 1988 WD 1988 U.S. Dist. LEXIS 13087 and *Naismith v. Professional Golfers Assoc.,* 85 FRD 552 (ND Ga. 1979).

Considering the breadth of 42 USC 2000e, NABORS/DELAWARE falls within the reach of definition of employer and can therefore be held liable for acts of its agents who deny an employment opportunity with a successor company. The Supreme Court has said that Congress' objective was to "achieve equality of employment opportunities . . . ." *Griggs v. Duke Power Co.,* 401 U.S. 424, 429, 91 S.Ct. 849, 853, 28 L.Ed2d 158 (1971).

The only avenue shown at trial to be hired by MANSFIELD INDUSTRIES (a/k/a NABORS/DELAWARE) was through NABORS/DELAWARE (a/k/a STEEGO). Apparently, it was the exclusive route until August 24, 1988, when the only other route was through the Louisiana Job Service. This was especially true since all

repair shop employees who were **interviewed** were hired and all who were hired were interviewed. No one but Leone and Mason took place in these interviews. The definition of employer has been held to be the one who exercises significant **control of access** to employment. *Toot v. Ebby,* 39 CCH EPD Section 35963 (1984 N.D. Ind.). See also *Baranek v. Kelly,* 630 F.Supp. 1107 (D.C. Mass 1986). Since it was STEEGO supervisor who controlled access to MANSFIELD INDUSTRIES jobs, then it is STEEGO that is liable as an employer for discriminatory acts occurring in the access to those jobs. There can be no doubt but that Mason was an agent of STEEGO since he conducted all interviews during the work hours while drawing pay from STEEGO.

CONCLUSION

In conclusion, your Petitioner respectfully contends that the U.S. Fifth Circuit Court of Appeals erred by reversing the lower court. STEEGO knowing that a recruitment drive was occurring on its premises, permitted Leone and Mason to retain the powers to hire and fire. During working hours while being paid, Leone and Mason deliberately and intentionally discriminated against William T. Moham by interfering with his right to seek employment with a third party.

The Court of Appeals, using a benefit analysis, ruled that neither Leone nor Mason were motivated by an intent to benefit their employer; thus, they were not agents and STEEGO could not be held liable for their acts. The majority, if not all, of other courts use a strict liability analysis to determine the liability of the employer for acts of supervisory employees who have been given the power to do the things which give rise to the discrimination. The Court of Appeals has broken new ground by requiring an employee prove that his discriminator was doing something to benefit his employer to some extent before it find an agency

relationship existed. The requirement will create a major obstacle to relief to those who are the victims of discrimination under Title VII.

Without a wide application of the agency relationship, it would be difficult for victims of discrimination to assess liability against the corporate employer or others who are able to afford the victim compensation. Without compensation or a remedy, the effect of Congressional will is rendered null.

The frequency with which employer liability based upon an agent's conduct arises in Title VII litigation and the current lack of clarity as to the analysis to be applied, are of such social importance as to command a definitive pronouncement by this Court.

Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully Submitted.

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APPENDIX A: OPINION BELOW
OPINION OF
U.S. FIFTH CIRCUIT COURT OF APPEALS

MOHAM v. STEEGO CORP.

William T. MOHAM, Plaintiff-Appellee,
v.
STEEGO CORP., et al., Defendants,
Steego Corporation, Defendant-Appellant.
No. 92-5165.

United States Court of Appeals,
Fifth Circuit

Sept. 27, 1993

Black former employee of predecessor selling company brought Title VII employment discrimination action against selling company and others, arising from selling company's supervisory employees' failure to allow black employee to apply for position with successor purchasing company. The United States District Court for the Western District of Louisiana, Tom Stag, J., entered judgment for black employee. Selling company appealed. The Court of Appeals, Barksdale, Circuit Judge, held that selling company could not be held liable under Title VII for racially discriminatory acts committed by its supervisory employees while in employ of selling company, but while acting for benefit of purchasing company.

Affirmed in part, reversed and rendered in part, and remanded.

1. Civil Rights † 378

In Title VII employment discrimination case, plaintiff must first establish prima facie case of discrimination; if he does, he has created presumption of discrimination and burden shifts to defendant to articulate some legitimate, nondiscriminatory reason for challenged action. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

2. Civil Rights † 378

If defendant in Title VII employment discrimination case meets burden to articulate legitimate, nondiscriminatory reason for challenged action by presenting evidence which, if believed by trier of fact, would support finding that unlawful discrimination was not cause of employment action, then presumption raised by plaintiff's prima facie case essentially disappears and plaintiff is left with ultimate burden, which never left him, of proving that defendant intentionally discriminated against him. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

3. Civil Rights † 153

In Title VII employment discrimination case, trier of fact must still answer ultimate question of whether defendant intentionally discriminated against plaintiff, even if defendant's alleged legitimate, nondiscriminatory explanation for challenged action has been rejected. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

4. Civil Rights † 153

Rejection of defendant's alleged legitimate, nondiscriminatory explanation in Title VII employment discrimination case for challenged action is not, in and of itself, finding of intentional discrimination; reason cannot be provided to be pretext for discrimination unless it is shown both that reason was false and that discrimination was real reason. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

5. Corporations † 445.1

Predecesor selling company could not be held liable under Title VII for Racially discriminatory acts of its supervisory employees, in refusing to allow black employee of selling company to apply for position with successor purchasing company, committed by supervisory employees while in employ of selling company, but while acting for benefit of purchasing company. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1).

6. Master and Servant † 302(1)

Servant's conduct is within scope of his employment if it is kind he is employed to perform, it occurs substantially within authorized time and space limits, and it is actuated, at least in part by purpose to serve master.

Appeal from the United States District Court for the Western District of Louisiana.

Before REAVLEY, DUHE, and BARKSDALE, Circuit Judges.

BARKSDALE, Circuit Judge:

In this Title VII case, the only issue on appeal concerns the denial of the equal opportunity to seek employment; and that issue turns on whether a selling company can be held liable for the discriminatory acts of its supervisors committed while in the employ of the seller, but while acting for the benefit of the purchasing company. Because we conclude that such liability would push beyond the limits of applicable general agency principles, we REVERSE that part of the judgment appealed from.

I

Nabors Trailers, Inc., a subsidiary of Steego Corporation, manufactured and distributed trailers through its facility in Mansfield, Louisiana. Early in 1988, it stopped manufacturing, maintaining only its parts, shipping and service departments.

The repair shop was part of the service department. William T. Moham, who began his employment with Nabors in 1966, worked in that shop. In June 1988, Moham (age 58) and four others were working under the supervision of foreman Tommy Mason and service department supervisor Joe Leone. Three of Moham's co-workers were white; Moham and one co-worker were black. All three whites received raises that month; neither Moham nor his black co-worker did.

On August 23, 1988, pursuant to an agreement signed that July 1, Nabors sold its assets to Mansfield Industries, Inc., which assumed operation of the business the next day.[1] In the weeks prior to the sale, Mason had made applications for employment with the new company (Mansfield) available to the repair shop employees. All except Moham were interviewed and assured that they would maintain their positions after the sale.[2]

As Moham left work on Tuesday, August 23, -at approximately four o'clock, Mason told him that, if the sale took effect that night, Moham would no longer have a job; otherwise, he should report to work as usual. When Moham asked for an explanation, Mason said that Moham had failed to turn in his application. Moham offered to go home, get the application and return it immediately. Instead, Mason gave Moham his paycheck, and instructed him to turn in his application at the Louisiana Job Service office.

Within an hour, Mason had telephoned a friend, who was white, and suggested that his 19-year-old son come to the plant for an interview. And, by six o'clock that day, the friend's son had been hired to fill Moham's position and report to work the following day for the new company. The next morning, Moham returned and met with Leone, who again told him that he must apply for a job through the Louisiana Job Service.

After filing a complaint with the EEOC for age and race discrimination, Moham was issued a right to sue letter; and suit was brought against, *inter alia*, Mansfield and Steego, Nabors' parent. Because of its bankrupt status, Mansfield was dismissed, pursuant to joint motion. And, because

---

1. Mansfield Industries took the name "Nabors Trailers". We refer to it as "Mansfield".

2. Wilfred Woods, the other black working in the repair shop, suffered a job-related injury after he submitted his application. As a result, he was not on the job when the sale took place, but was interviewed and hired when he returned after the sale.

Nabors and Steego had merged, the parties agreed that Steego would be liable for any discriminatory acts by Nabors.

After a short bench trial, the district court found Steego liable for the discriminatory acts which deprived Moham of both the June pay raise ($320 in damages) and the opportunity to seek employment with Mansfield (net damages of approximately $37,000). The court also found that Moham had not established age as a motivating factor in those discriminatory acts.

II

Section 703(g)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* states that it is an unlawful employment practice for an *employer* to

> fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1). Steego does not challenge the pay raise ruling; it appeals only the finding that Mason and Leone violated Title VII and the conclusion that they did so as its agents. Because only the liability of Steego (Nabors), the selling company, is in issue, we need not reach the issue of discrimination, unless Steego can be held liable for it. Therefore, we address the latter issue first.

[1,2] But, for a full understanding of this issue, we need to present briefly the claimed discriminatory acts. And, in order to do that, we must note quickly that the burden of proof for § 2000e cases, articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973), has been recently reaffirmed and clarified in *St. Mary's Honor Center v. Hicks,* —— U.S. ——, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). As is well known, the plaintiff must first establish a prima facie case of discrimination. If he does, he

has created a presumption of discrimination, *see Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); and the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the challenged action, *McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824. If the defendant meets this burden by presenting evidence which, "if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action", *St. Mary's,* —— U.S. at ——, 113 S.Ct. at 2747 (emphasis omitted), then the presumption raised by the plaintiff's prima facie case essentially disappears, and the plaintiff is left with the ultimate burden, which has never left him: that of proving that the defendant intentionally discriminated against him, *see id.*

[3,4] And, the trier of fact must still answer that ultimate question of discrimination, even if the defendant's explanation has been rejected. As explained in *St. Mary's,* that rejection is not, in and of itself, a finding of intentional discrimination. "[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason". *Id.* at——, 113 S.Ct. at 2752 (citation and emphasis omitted).

The defendant's proffered reason for hiring the 19-year-old white, and not considering Moham for his old position with the new company, was that he did not apply for it. When asked if Moham was not hired because he failed to turn in his application, Mason testified that Moham was rejected "[s]olely on that basis". In addition to finding Mason's testimony "unconvincing", the court found Moham's testimony "credible" and obviously believed that he had specifically asked for permission to submit his application before leaving work on August 23 — *before* Mason solicited an application from his friend's son. Certainly this is a finding that the defendant's proffered reason is false.(This finding is supported by the testimony of a white co-worker of Moham's, who testified that Mason told him in June 1988

that "he was maybe gonna have an all-white shop, get rid of all these blacks".) The court went on to make the required finding on the ultimate question: "Mr. Moham, a black man, was discriminatorily denied an equal opportunity to seek employment with the new company."

[5] Therefore, assuming that Mason and Leone did discriminate in this fashion against Moham on the basis of his race, we must determine whether Steego can be held liable for that discrimination. On this issue, the district court concluded:

> Tommy Mason and Joe Leone were employees of Nabors . . . at the time the discriminatory acts occurred, were being paid by Nabors . . . and were acting within the purview of their employment as supervisory personnel of Nabors . . . Their actions in denying Moham the equal opportunity to seek employment with the new company [Mansfield] were clearly within the scope of their employment. An employer is liable for the discriminatory acts of its personnel.

Needless to say, we freely review this conclusion of law.

For the definition of "employer", 42 U.S.C. § 2000e(b), Congress includes "any agent of such a person". Because of such use of the term "agent", instead of "employee" or "supervisor", for example, the Supreme Court has interpreted this provision to mean "that Congress wanted courts to look to agency principles for guidance in this area". *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72, 106 S.Ct. 2399, 2408, 91 L.Ed.2d 49 (1986). The Court noted that although "common-law principles [of agency] may not be transferable in all their particulars to Title VII, Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely envinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.* In its ruling, the Court cited the Restatement (Second) of Agency. *Id.*

[6] Section 219 of the Restatement provides that a master is liable for the acts of his servants "committed while acting in the scope of their employment". A servant's conduct is within the scope of his employment if

> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits; [and]
>
> (c) it is actuated, at least in part, by a purpose to serve the master.

Restatement (Second) of Agency § 228(1).

Parts (a) and (b) are not at issue; it is uncontested that Mason and Leone were authorized to hire repair shop employees for Nabors and that their acts took place on Nabors' property during working hours. The final element, however, cuts against Steego's liability, and is decisive.

Consistent with the above quoted § 228, Restatement § 235 provides that conduct is not within the scope of employment if it is not performed for the purpose of serving the master. The comment explains that the rule applies

> although the servant would be authorized to do the very act done if it were done for the purpose of serving the master, and although outwardly the act appears to be done on the master's account. *It is the state of the servant's mind which is material* . . . Conduct is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master.

Restatement (Second) of Agency § 235 cmt. a. (emphasis added).

As stated, we find this agency principle applicable and controlling. Mason and Leone took applications and interviewed potential employees *for Mansfield,* the purchasing company. The applicants were already employed by Nabors. Interviewing them for positions with a successor company might have been "actuated . . . by a purpose to

serve" the predecessor (Steego/Nabors) if it had contracted to have a work force in place, or if the sale was more likely to take place, or at a higher price, if the work force remained. But, there was no such evidence. In fact, John Lowrey, a representative of the purchaser, testified that Mansfield was "buying assets, and it was up to us to make them productive. [Steego] didn't care whether we did or not." He further testified that the ongoing service department had no effect on the price Mansfield was willing to pay: "[A]s far as Mansfield was concerned, . . . [Nabors] was closed down. It was nice that there were a few people hanging around, but it didn't help us any, didn't add anything."

However, Lowrey did meet with Nabors' middle management in July or August and make it known that Mansfield wanted to start operations as soon as possible after the sale. It is unclear how, or when, these middle management employees were hired by Mansfield. In any event, Bobby Dillard, Nabors' plant superintendent, testified that "we all felt that the ones that were called at the meeting at Mr. Lowrey's would be involved with the [new] company". And, it is uncontested that "[m]iddle management was largely the same for [Steego/Nabors and Mansfield]."

Although he could not recall any discussion about having a work crew ready to start after the sale, Dillard testified that "it was kinda understood". And, at some point after the meeting with Lowery, Mason and Leone began distributing applications and conducting interviews. (Leone attended the meeting with Lowrey. Mason did not. Mason testified that his instructions to make the applications available came from Leone.) Dillard testified that, about three days before the August 23 sale, he also became involved with getting a crew together. He testified further that no one with Nabors or Steego consulted him, directed him, or had any connection with this effort. Dillard confirmed that his actions were "just an effort to assist the new owners in starting up".

In asserting that the discriminatory acts are nonetheless attributable to Steego, Moham relies upon *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338 (D.C.Cir.1973) and a line of similar cases. *Sibley*, however, does not involve an agency question. Rather, it notes that Title VII prohibits an employer from discriminating against "any individual", and holds that, under its plain meaning, a plaintiff may sue one who interferes with his access to employment, even if he is not the plaintiff's direct employer. The question here, however, is not whether Steego could be liable under Title VII if its agents had interfered with Moham's access to employment. Rather, the question is whether Mason and Leone were, in fact, acting as Steego's agents while hiring repair shop employees for the new company. We conclude that they were not. Instead, they were acting solely for the benefit of Mansfield; and, therefore, their discriminatory acts cannot be attributable to Steego, the selling company.[3]

III

Accordingly, that part of the judgment appealed from (equal opportunity to seek employment) is REVERSED, and judgment is RENDERED for Steego on that issue; and this matter is REMANDED for such further proceedings as may be necessary.

AFFIRMED in Part, REVERSED and RENDERED in Part, and REMANDED.

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3. As alternative bases for Steego's liability, Moham seeks assistance under theories of equity and of Steego (Nabors) and Mansfield "be[ing] considered brother-sister corporations for acts of discrimination occurring during the transition period". Neither theory has merit. The former is, in fact, no more than a misguided deep pocket approach; the cases relied on concern successor liability, while here it is the predecessor that Moham seeks to hold liable. And, the latter theory is not supported by the record.

APPENDIX B: OTHER OPINIONS
OPINION OF
U.S. DISTRICT COURT,
WESTERN DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

U. S. DISTRICT COURT
WESTERN DISTRICT
OF LOUISIANA
FILED
JUNE 17, 1992
ROBERT H. SHEMWELL,
CLERK
By_____
DEPUTY

WILLIAM TERRELL MOHAM
versus

CIVIL ACTION NO. 90-1149
SENIOR JUDGE TOM STAGG

STEEGO CORPORATION, MANSFIELD INDUSTRIES and NABORS TRAILERS

MEMORANDUM RULING

This action, for employment discrimination with claims of both racial and age discrimination, was tried to the bench on June 15th and 16th. In accordance with the testimony given and the evidence received, the court renders the following findings of fact and conclusion of law. Plaintiff was employed by Nabors Trailers, Inc., a Delaware corporation (hereinafter "Nabors/Delaware") from September 16, 1966 to August 23, 1988. On August 23, 1988, Nabors/Delaware sold its plant and machinery and ceased operations. The "new company," Mansfield Industries, Inc., took over operations on the following day. On that date, August 24, 1988, Mansfield Industries changed its name to Nabors Trailers, Inc. of Louisiana. The "old company," Nabors/Delaware, was a subsidiary of Steego Corporation when the alleged acts of discrimination took place. The parties have stipulated that Nabors/Delaware had merged with Steego Corporation, with Steego Corporation being the surviving entity. Thus, Steego Corporation will pay any judgment which might be cast against Nabors/Delaware in this litigation. Plaintiff dismissed as defendants the "new company," Nabors Trailers, Inc. of Louisiana, and its

predecessor in name, Mansfield Industries, Inc., because these parties, for all practical purposes, are bankrupt with no money being available for unsecured creditors.

During early 1988, Nabors/Delaware closed down its trailer manufacturing department and retained only the parts, service and shipping departments as active operations. From then to the date of the sale, it actively sought a buyer. Rumors were common, as the Nabors plant was an important economic fact in the town of Mansfield

William T. Moham is a black person who was born on April 13, 1930. He commenced employment with Nabors/ Delaware as a repairman, working in the repair shop. Plaintiff testified (without being disputed) that he has never been fined or disciplined in any fashion during the entire time he was employed at Nabors/Delaware. Furthermore, the weight of the evidence establishes that plaintiff was an exemplary 22 year veteran employee of Nabors of Delaware. On June 27, 1988, plaintiff was being paid at the hourly rate of $7. In June 1988, all three white members of the repair shop received pay raises, but not the two black employees. Gerald Lafitte testified that he received a raise of 50 cents an hour in June 1988. Plaintiff's Exhibits 6 and 7, respectively, established that Cooper and Ryals received raises of $1 per hour. Gerald Lafitte, a white male in the repair shop, further testified that Tommy Mason, the repair shop foreman, made him promise not to tell anyone that he had received a raise. Lafitte stated that Mason had later, during the summer of 1988, expressed an opinion that he would "like to clean up his shop and have only white men working for him." Of fourteen supervisory positions available at Nabors/ Delaware, only one was ever held by a black employee. There was also testimony the black employees in the shop were given the "dirtiest" or most undesirable jobs.

Prior to the sale of assets of Nabors/Delaware to Mansfield Industries, Inc., Mason individually passed out employment applications to the repair shop workers.

Plaintiff testified that he was not told of any deadline for returning the application. After the return of the applications, Joe Leone and Tommy Mason personally interviewed each worker, except plaintiff Moham and Wilfred Woods, the two black workers at the shop. Plaintiff Moham had not turned in an application and Woods had not yet returned to work due to a job injury. Woods turned in an application and was interviewed after the sale when he returned to work.

All of the interviewed employees were eventually hired by the new company. The only difference in pay or other terms of employment was that new drug screening procedures were added. All acts of Joe Leone, the Service Department supervisor, and Tommy Mason relative to the employment applications and interviews occurred on the premises of Nabors/Delaware during regular business hours while Leone and Mason were being paid by Nabors/Delaware. Leone testified that he had the authority to hire for the new company as he had always had the hiring authority in the past, and it was never questioned. Leone and Mason's authority to interview and hire employees for positions with the new company came within the purview of their supervisory positions with Nabors/Delaware. The employees of the new company had been interviewed and hired on the premises of Nabors/Delaware, during the normal working hours of Nabors/Delaware, and by supervisory employees of Nabors/Delaware, Leone and Mason, who traditionally had control over the status of the repair shop employees. All supervisors and foremen (middle management) remained the same between the two companies, Nabors/Delaware and Nabors of Louisiana, and essentially the same employment practices were continued.

On Tuesday, August 23, 1988, at the end of the work day, Tommy Mason told plaintiff that he need not come to work the next day if the "sale" went through that night. Moham asked why and was told that he had not turned in an application. Plaintiff requested that he be allowed to turn in

an application; Mason told him that he must do so with Louisiana Job Service. Plaintiff was then given his pay check for the previous week — normally he would have received this check on the upcoming Thursday. Obviously, plaintiff was not expected to be at work on Thursday. Sometime within the next hour Mason telephoned an old friend, Mr. Cobb, and asked his wife to send their son, Clay Cobb, to the plant for an interview. Leone and Mason interviewed Clay Cobb, a white 19-year-old, and then hired him to report to work the next morning for Nabors of Louisiana. Mason testified that Clay Cobb had not previously filled out an application, but filled one out then, on the evening of August 23, at Nabors/Delaware's office. Louisiana Job Service was not utilized to fill this position. The next morning, Mr. Moham returned to Nabors and was told by Leone to turn in an application at the Louisiana Job Service office in Mansfield.[1] Clay Cobb, however, had already been hired to

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1 There is some conflict in the testimony about the filing of Mr. Moham's application. He testified at trial that, at or about 4:00 O'clock on Tuesday afternoon, he left the plant, drove to his home, retrieved the application form and filed it at the Job Service Office before it closed at 5:00 P.M. Plaintiff's deposition testimony, filed in the record at trial, was ambiguous on this issue. The court finds plaintiff's testimony at trial to be credible. In plaintiff's deposition at page 31, referring to the employment application, plaintiff stated:

> I went back the next day and talked to the supervisor, Joe Leone, I talked with him about it. I said Joe, you know, I have been trying to do the right thing since I have been at Nabors Trailer, said if anything had been posted on the bulletin board, something like that, I would have brought the application back. If they had let me know or posted it on the board, I would have brought it back. He told me like Tommy, well, that's your responsibility. And I said, I will go get it. Well, you have to carry it back to Job Service, you can't bring it back here. That's what Tommy Mason told me. I said okay.

fill plaintiff's position. Plaintiff never worked for Nabors of Louisiana.

Wilfred Woods, the remaining black in the repair department, testified that, although Clay Cobb knew something about welding, he had to be closely supervised and trained in most aspects of the job.

Tommy Mason was of the opinion that plaintiff was not producing according to his ability and, for that reason, was not deserving of a raise in June of 1988. Joe Leone could not even specifically remember the June 1988 raises. Both men testified that plaintiff was not rehired, because he had not submitted his application.

Plaintiff alleged two theories of recovery: (1) race discrimination and/or (2) age discrimination.

RACE DISCRIMINATION — PAY RAISE

To establish a prima facie case of racial discrimination with respect to compensation, the plaintiff must show that he was paid less than a member of a different race was paid for work requiring substantially the same responsibility. *Pittman v. Hattiesburg Municipal Separate School District,* 644 F.2d 1071 (5th Cir. 1981), *citing Calcote v. Texas Educational Foundation,* 578 F.2d 95 (5th Cir. 1978). Plaintiff established that three white employees received raises in June 1988, while the two black employees, including himself, did not. These five employees were doing essentially the same work in Nabors/Delaware's repair shop. Once it is established that a party received unequal pay for substantially identical work, the prima facie case of racial discrimination for unequal compensation is made out and the next question then becomes whether defendant can rebut the prima facie case by articulating a legitimate, nondiscriminatory reason for the employment action. *See McDonnell-Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973).

Defendants' explanation of their legitimate reasons must be clear and reasonably specific. *Pittman* at 644, *citing Texas Department of Community Affairs v. Burdine*, 101 S. Ct. 1089, 1096, 67 L.Ed.2d 207 (1981).

Plaintiff claims he was denied a raise for racial reasons; and established a prima facie case of such. Defendant contends that Mr. Moham's work was poor. The Fifth Circuit, in *Lloyd v. Georgia Gulf Corp.*, ____ F. 2d ____ (June 2, 1992), has recently stated that "when an employer's stated motivation for an adverse employment decision involves the employee's performance, but there is no supporting documentation, a jury can reasonably infer pretext." There is no documentation of poor job performance by Mr. Moham. His co-workers testified that plaintiff was a 22-year veteran employee who in actuality trained the majority of them. The only testimony of plaintiff's alleged poor job performance was by Tommy Mason and, in light of the other testimony, it is unconvincing. Nabors/Delaware is liable pursuant to Title VII for unequal compensation due to race discrimination. Damages are for back pay in the amount of $1.00 an hour from June 27, 1988 to August 24, 1988 for 40 hours a week, totaling $320.00

RACE DISCRIMINATION —
DENIAL OF EQUAL OPPORTUNITY
TO SEEK EMPLOYMENT

Title VII of the Civil Rights Act of 1964 as amended prohibits discrimination in any employment decision. Section 703(a) (1) relates to racially discriminatory hiring practice claims. There are jurisdictional prerequisites to a federal action: (1) filing of timely charges of employment discrimination with the Equal Employment Opportunity Commission and (2) receiving and acting upon the Commission's statutory notice of the right to sue, 42 U.S.C. § § 2000e-5(a) and 2000e-5(e). In *McDonnell-Douglas*, the Court addressed the order and allocation of proof in a private, non-class action challenging employment dis-

crimination. The Court concluded that a complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications he was rejected; and (4) that, after his rejection, the position remained opened and the employer continued to seek applications from persons of complainant's qualifications. The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Statistics as to employment policy and practice may be helpful to a determination of whether a claim conforms to a general pattern of discrimination against blacks. *Id.* at 1825.

Mr. Moham is to be given a full and fair opportunity to demonstrate by competent evidence that, the presumptively valid reason for his rejection was, in fact, a cover up for a racially discriminatory decision. If the employee articulates a legitimate, non-discriminatory reasons for its actions, the presumption created by the plaintiff's prima facie case dissolves and the burden reverts to the plaintiff to prove that the employer's reasons were pretextual. *Thornbrough v. Columbus & Greenville Railroad Co.*, 760 F.2d 633, 646 (5th Cir. 1985), *citing Burdine*, 450 U.S. at 253-55, 101 S. Ct. at 1093-94. Plaintiff can establish pretext by introducing evidence to prove that the reasons stated by the employer, though facially adequate, was untrue as a matter of fact or was, although untrue, a mere cover or pretext for illegal discrimination. *Elliott v. Group Medical & Surgical Services*, 714 F.2d 556 (5th Cir. 1983), *cert. Denied* 467 U.S. 1215, 104 S. Ct. 2658, 81 L.Ed.2d 364 (1984). The trier of fact may not disregard the defendant's explanation without countervailing evidence that it was not the real reason for the discharge. *Id.*

Plaintiff alleges that he was denied the opportunity to seek employment with the new company and the position that was open was filled by an unqualified, young white

male. Plaintiff further contends that the employment practices of Nabors/Delaware were conducive to causing racial discrimination.

Joe Leone was supervisor of the service department, with control over personnel matters within this department. Tommy Mason, as foreman of the repair shop, had joint control with Joe Leone of the personnel within the repair shop division of the service department. "A person is an agent under § 2000e(b) if he participated in the decision making process that forms the basis of the discrimination." *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986) (citations omitted). Tommy Mason and Joe Leone were employees of Nabors/Delaware at the time the discriminatory acts occurred, were being paid by Nabors/ Delaware and were acting within the purview of their employment as supervisory personnel of Nabors/Delaware. Their actions in denying Moham the equal opportunity to seek employment with the new company were clearly within the scope of their employment. An employer is liable for the discriminatory acts of its personnel. *Hamilton, citing Gay v. Board of Trustees San Jacinto College*, 608 F.2d 127 (5th Cir. 1979). In *Gay*, defendant college was held liable for the acts of a supervisor for discriminatorily discharging an employee, despite the fact that under institutional procedures not proved to be known to the plaintiff, only the president could fire an employee of the college. The Fifth Circuit found that the college "held out the supervisor as a person having authority over those under his supervision, and that plaintiff perceived him to have authority to discharge her." *Id.* at 128. Nabors/ Delaware, or Steego, is ultimately liable for the acts of its agents, Tommy Mason and Joe Leone.

Plaintiff established a prima facie case of racial discrimination for denial of an equal opportunity to seek employment with the new company. Mr. Moham was effectively discharged and replaced by Clay Cobb on August 23, without being allowed to submit an application for employment with the new company. These actions occurred

prior to the sale. Defendant's sole explanation for hiring Clay Cobb is that Mr. Moham failed to submit an application. In light of Mr. Moham's convincing testimony that prior to leaving work on August 23 he requested to be allowed to submit this application, the court finds that defendant has failed to prove by a preponderance of the evidence that its employment decision was based upon a clear and reasonable nondiscriminatory, legitimate reason. Mr. Moham, a black man, was discriminatorily denied an equal opportunity to seek employment with the new company, in favor of Clay Cobb, a white man who was less qualified for the position.

AGE DISCRIMINATION

The elements of a Title VII case as set forth in *McDonnell-Douglas* apply to suits arising under the ADEA for age discrimination. *See Bohrer v. Haynes Corp.*, 715 F.2d 213, 218 (5th Cir. 1983), *cert. denied* 465 U.S. 1026, 104 S. Ct. 1284, 79 L.Ed 687 (1984), *citing Reeves v. General Food Corp.*, 682 F.2d 515 (5th Cir. 1982). The ultimate issue in an age discrimination case is whether plaintiff has proved that age was a motivating factor in the defendant's adverse employment decision. *Burdine*, 450 U.S. at 257, 101 S. Ct. at 1095. Although plaintiff has established racial discrimination, he has not established that age was a motivating factor for defendant's adverse employment decision.

CONCLUSION

Defendant Steego, as the stipulated surviving merged corporation, is liable to plaintiff for racial discriminatory acts, in that plaintiff received unequal pay and was refused equal employment opportunity on the basis of his race.

Mr. Moham is entitled to damages for back pay for his claim for denial of equal opportunity to seek employment, from August 24, 1988 to September 9, 1991 at $8.00 an hour for 40 hours per week. This amounts to 158.71 weeks for a loss of $50,788.57. Plaintiff earned $14,087.06 from other em-

ployment and, therefore, is entitled to $36,701.51 for this claim. Plaintiff is to submit an affidavit with respect to attorney's fees, in accordance with the Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (1974), within ten (10) days of this ruling. Defendant shall then have ten (10) days within which to submit a response to plaintiff's request for attorney's fees, and Judgment will be entered accordingly.

DATED AND SIGNED at Shreveport, Louisiana, this 17th day of June, 1992.

S/Tom Stagg
SENIOR JUDGE TOM STAGG

Judgment Entered 6-17-92
By BC
Copy to Cameron
Baker/Coleman
Frazer
McMichael

APPENDIX C:
ORDER ON REHEARING EN BANC

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5165

U.S. COURT OF APPEALS
FILED
OCT. 26, 1993
CHARLES R. FULBRUGE, III
CLERK

WILLIAM T. MOHAM, Plaintiff-Appellant,

versus

STEEGO CORP., ET AL. Defendants,

STEEGO CORPORATION, Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion September 27, 1993), 5 Cir., ____, ____ F.2d ____)
(October 27, 1993)

Before REAVLEY, DUHE' and BARKSDALE,
Circuit Judges.

PER CURIAM:

(✓) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
S/Rhesa H. Barksdale
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

IN THE
UNITED STATES SUPREME COURT

No.:

WILLIAM T. MOHAM,	:	No.:
	:	
Petitioner	:	
VERSUS	:	
	:	
STEEGO CORPORATION, et al	:	
	:	
Respondent		

CERTIFICATE AND PROOF OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing **Petition for Writs of Certorari** filed on behalf of the Petitioner/Plaintiff - Appellee, William T. Moham, has been served upon Donald Baker, attorney at law, 525 Market Street, Shreveport, Louisiana 71101; Charles L. Ephraim, and Eugene A. Boyle, NEAL GERBER & EISENBERG, Two North LaSalle Street, Suite 2200, Chicago, Illinois 60602 by placing same in the United States mail, with sufficient first class postage prepaid thereon.

Shreveport, Louisiana, this 17th day of December, 1993.

S/Nelson W. Cameron
NELSON W. CAMERON

Supreme Court, U.S.
FILED
FEB 24 1994
OFFICE OF THE CLERK

No. 93-1277

In The

Supreme Court of the United States

October Term, 1993

WILLIAM T. MOHAM,

Petitioner,

v.

STEEGO CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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STATEMENT IN COMPLIANCE WITH RULE 29.1

Respondent Steego Corporation is a wholly-owned subsidiary of BIL (Far East Holdings) Limited, a Hong Kong corporation. Respondent has no subsidiaries other than wholly-owned subsidiaries.

BIL (Far East Holdings) Limited, a Hong Kong corporation, is the controlling shareholder of Anadite Inc., Everest & Jennings International, Inc., Molokai Ranch, Ltd., Associated Host, Inc. and Mount Charlotte Limited.

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No. 93-1277

In The

Supreme Court of the United States

October Term, 1993

WILLIAM T. MOHAM,

Petitioner,

v.

STEEGO CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner seeks review of a decision of the court of appeals reversing a final judgment of the district court which held Respondent liable for denying Petitioner equal opportunity to seek employment with the purchaser of Respondent's assets.[1]

The decision below is not in conflict with any decision of any other court of appeals or inconsistent with

[1] The court of appeals' decision is attached to the Petition at Appendix A. References to the Petition appear as "(Pet.___)" and references to the Appendix appear as "(A.___)".

any decision of this Court. No special or important issues are raised by the petition, and further review is not warranted.

The statement of facts in the Petition contains a number of inaccuracies and omissions. First, in describing the meeting that took place in July of 1988 between John Lowrey, President of Mansfield Industries, and the supervisors and managers of Nabors Delaware, Petitioner states that "[t]here was no discussion of employment of anyone by the prospective buyers" (Pet. 11). While the issue of hiring a workforce may not have been specifically addressed at this meeting, Lowrey made it known that Mansfield wanted to start operations as soon as possible after the sale, and those in attendance understood that it would be their responsibility to have a work crew ready to start. Indeed, one of these employees testified that his actions were "just an effort to assist the new owners in starting up" (A.31).

Second, Petitioner states that "[t]he parties understood, including Steego negotiators that Mansfield Industries (a/k/a NABORS/LOUISIANA) was buying an ongoing concern and not buying for scrap" (Pet. 11). The testimony of Mr. Lowrey, relied upon by the court of appeals, flatly contradicts this statement: "[We] were buying assets, and it was up to us to make them productive. [Steego] didn't care whether we did or not" (A.31). He further testified that the ongoing service department had no effect on the price Mansfield was willing to pay: "[A]s far as Mansfield was concerned, . . . [Nabors] was closed down. It was nice that there were a few people hanging around, but it didn't help us any, didn't add anything" (A.31). Moreover, none of the employees who attended

the meeting with Mr. Lowrey was ever instructed, directed or authorized by any representative of Respondent or its subsidiary, Nabors Delaware, to begin recruiting a workforce on behalf of the new company. Neither Respondent nor Nabors Delaware assumed any obligation or made any effort to assist Mansfield in assembling a workforce.

Finally, Petitioner states, without any citation to the record, that Tommy Mason told repair shop employees as he was handing out applications that they should return them if they wanted "to work for NABORS/DELAWARE" (Pet. 12). This statement may be an inadvertent error but in any event is entirely inaccurate and unsupported by the record. There is no evidence suggesting that employees were told that the applications were to work for their current employer, Nabors Delaware. To the contrary, as plainly understood by the court of appeals, "Mason had made applications *for employment with the new company* (Mansfield) available to the repair shop employees" (A.26) (emphasis added).

Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission and later instituted this action in federal court against Respondent and Mansfield Industries. On the eve of trial, Petitioner voluntarily dismissed Mansfield Industries (and its subsidiary, Nabors Louisiana) because they were in the process of being liquidated and had insufficient assets to pay any judgment that might ultimately be entered, thus leaving Respondent as the sole defendant. The district court found that Respondent had violated Title VII by denying

Petitioner an equal opportunity to seek employment with Mansfield solely on the basis of his race.[2]

On appeal, the court of appeals reversed, holding that Leone and Mason were acting solely for the benefit of Mansfield when they refused Petitioner employment and, therefore, their discriminatory acts could not be attributed to Respondent (A.32). Petitioner's petition for rehearing and suggestions for rehearing *en banc* were denied.

REASONS FOR DENYING THE WRIT

I. Petitioner's Statement Of "Questions Presented" Identifies No Issue Calling For Review By This Court.

The first "Question Presented" in the Petition identifies no issue of law, but merely asks for review of the court of appeals' application of a legal standard to the particular facts of this case. Moreover, contrary to the implication of the question stated, the court of appeals did not hold that Mason and Leone were not agents of Respondent. Rather, it held that the actions taken by those individuals were not within the scope of their

[2] The district court also found Respondent liable for its failure to grant Petitioner a pay raise in June of 1988, prior to the sale, and awarded him $320.00 on this claim. In its appeal, Respondent did not challenge this portion of the district court's judgment.

employment by Respondent, and therefore the individuals were not acting as agents of Steego while hiring repair shop employees for the new company (A.32).

The second "Question Presented" is not raised by the decision of the court of appeals. The court of appeals did not address the question whether an employer may be held liable for discriminatory acts affecting an employee's employment by a third party, or call into question the holding of *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973) and similar cases. It merely held that those cases were inapplicable because the discriminatory acts were not attributable to Respondent (A.32).

II. The Decision Below, Finding On The Facts Presented That Tommy Mason And Joe Leone Were Not Acting As Agents Of Respondent When Hiring Employees For Mansfield, Is Not In Conflict With This Court's Decisions Or Decisions Of Other Courts of Appeals.

Petitioner has failed to identify any inconsistency between the court of appeals' decision and this Court's holding in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). In *Meritor*, this Court rejected the notion that employers are to be held strictly liable under Title VII for the acts of their supervisors, "regardless of the circumstances of a particular case." 477 U.S. at 73. Noting that Congress "surely" intended to place some limits on the acts of employees for which employers are to be held liable under Title VII, the Court directed the lower courts to look to general agency principles in determining employer liability, specifically referring them to the Restatement (Second) of Agency §§ 219-237 (1958). *Id.* at 72. In this case, the court of appeals applied the agency

principles set forth in the Restatement and concluded that Respondent could not be held liable for Leone's and Mason's failure to hire Petitioner to work for Mansfield Industries because Leone and Mason were not acting as Respondent's agents when making hiring decisions on behalf of Mansfield (A.29-32). The court of appeals' reasoning and conclusion is entirely consistent with this Court's holding in *Meritor*.[3]

Petitioner's suggestion (Pet. 17) that the decision below is in conflict with *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982), is difficult to follow. Apparently, Petitioner regards "traditional notions of respondeat superior" as differing in some unexplained fashion from "the rules of agency". Of course, the principles of respondeat superior are simply a part of the rules of agency. There is no inconsistency between the majority and concurring opinions in *General Building Contractors*, and nothing in either that casts any doubt on the principles applied by the court of appeals in this case.

Petitioner also contends that the appellate court's decision is contrary to decisions reached in other Circuits, including the Fifth Circuit, regarding an employer's liability for the discriminatory acts of its supervisors (Pet.

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[3] In *Meritor*, this Court "decline[d] the parties' invitation to issue a definitive rule on employer liability, but . . . agree[d] with the EEOC that Congress wanted courts to look to agency principles for guidance in this area." *Meritor*, 477 U.S. at 72. Thus, the only rule that comes out of *Meritor* relative to the issue of employer liability is that the courts should look to agency principles for guidance. The court of appeals' decision is not in conflict with this rule.

14-15). According to Petitioner, these courts "have established that in Title VII cases if an employer has control over the supervisor, the discriminatory acts of the supervisor are imputed to the principal/employer, thereby creating liability on the principal/employer" (Pet. 14). This incorrect statement of law is not only unsupported by the cases cited but also is directly contrary to this Court's holding in *Meritor Savings Bank FSB v. Vinson* that courts are not free to "impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances . . . " 477 U.S. 57, 73 (1986).

None of the cases cited by Petitioner stands for the broad proposition of law he advances. Each of the cases involved either the discriminatory exercise of authority clearly delegated to the supervisor by the employer/defendant, or conduct by the supervisor which grew out of and was occasioned by the employment relationship. *See, e.g., Flanagan v. A.E. Henry Com. Health Services Ctr.*, 876 F.2d 1231, 1234-35 (5th Cir. 1989) (immediate supervisors suspended and later discharged plaintiff because of her race); *Jett v. Dallas Independent School Dist.*, 798 F.2d 748, 762 n.13 (5th Cir. 1986) (noting in dicta that employer can be held liable under Title VII based on *respondeat superior*); *Hamilton v. Rodgers*, 791 F.2d 439, 442 (5th Cir. 1986) (supervisors participated in racial harassment of subordinate and made discriminatory car assignments and scheduling decisions); *Gay v. Board of Trustees*, 608 F.2d 127, 128 (5th Cir. 1979) (supervisor discharged plaintiff because of her race); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (supervisor's recommendation of discharge tainted by age bias); *Horn v. Duke Homes, Div. of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 605 (7th Cir.

1985) (plant superintendent discharged plaintiff for failure to submit to sexual advances); *Tafoya v. Adams*, 612 F. Supp. 1097, 1104 (D. Colo. 1985), *aff'd*, 816 F.2d 555 (10th Cir.), *cert. denied*, 108 S. Ct. 152 (1987) (supervisor's discharge of plaintiff based on national origin); *Paroline v. Unisys Corp.*, 829 F.2d 100, 106 (4th Cir. 1989) (material issue of fact existed concerning adequacy of employer's remedial action upon learning of supervisor's sex harassment); *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1515 (11th Cir. 1989) (supervisor participated in creating racially hostile work environment eventually leading to plaintiff's constructive discharge). In each of these cases, the supervisor was doing the very thing the employer authorized him to do – hiring, firing or supervising the employer's employees. The mere fact that the employer did not authorize the supervisor to perform these tasks in a discriminatory manner would not serve to insulate the employer from liability. The discrimination occurred in the course of the supervisor's exercising the authority he received from the employer, and, therefore, under common law agency principles, it was appropriate to hold the employer liable.

In the present case, in contrast, Respondent never granted Leone and Mason the authority to conduct interviews or make hiring decisions for Mansfield, a fact Petitioner ignores. As the court of appeals correctly noted, that authority came, either expressly or by reasonable inference, from Mansfield (A.30-31). Leone and Mason were acting solely for the benefit of Mansfield,

and pursuant to a grant of authority they received from Mansfield.[4]

Thus, unlike the supervisors' acts in the cases relied upon by Petitioner, Leone's and Mason's acts fell outside the scope of their employment with Respondent because they were in no way motivated by a desire to further Respondent's business (A.30-32); Restatement (Second) of Agency § 228(1). The court of appeals' decision does not, as Petitioner declares, "place an additional requirement on the plaintiff to prove that what the agent was doing for the employer when he committed racial discrimination was *in fact* benefitting the employer . . . " (Pet. 15)

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[4] Contrary to Petitioner's suggestion at pages 17-18 of the Petition, the fact that Mansfield may not have given *express* instructions to Leone and Mason to assemble a workforce and was not paying them at the time does not mean that no agency relationship could exist. Section 26 of the Restatement (Second) of Agency provides that:

> authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account.

Furthermore, Section 16 expressly recognizes that agency relationships may be gratuitous: "The relation of principal and agent can be created although neither party receives consideration." As the court of appeals noted, Leone and Mason clearly were under the impression, based on the meeting Leone attended with John Lowrey, a representative of Mansfield, that Mansfield wanted them to begin assembling a workforce and that they would be working for Mansfield after the sale (A.31). Had Petitioner not voluntarily dismissed Mansfield from the lawsuit, these facts would certainly have supported a finding that an agency relationship existed between Mansfield and Leone and Mason.

(emphasis added). Rather, the decision merely reaffirms the long-standing rule that employers will only be held liable for acts of their agents that are committed within the scope of the agent's employment, and that acts that are taken *solely* to benefit an independent third party are not within the scope of employment.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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